

No. 18680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB,

Appellant,

vs.

BONAFIDE MILLS, INC.,

Appellee.

APPELLEE'S BRIEF.

FILED

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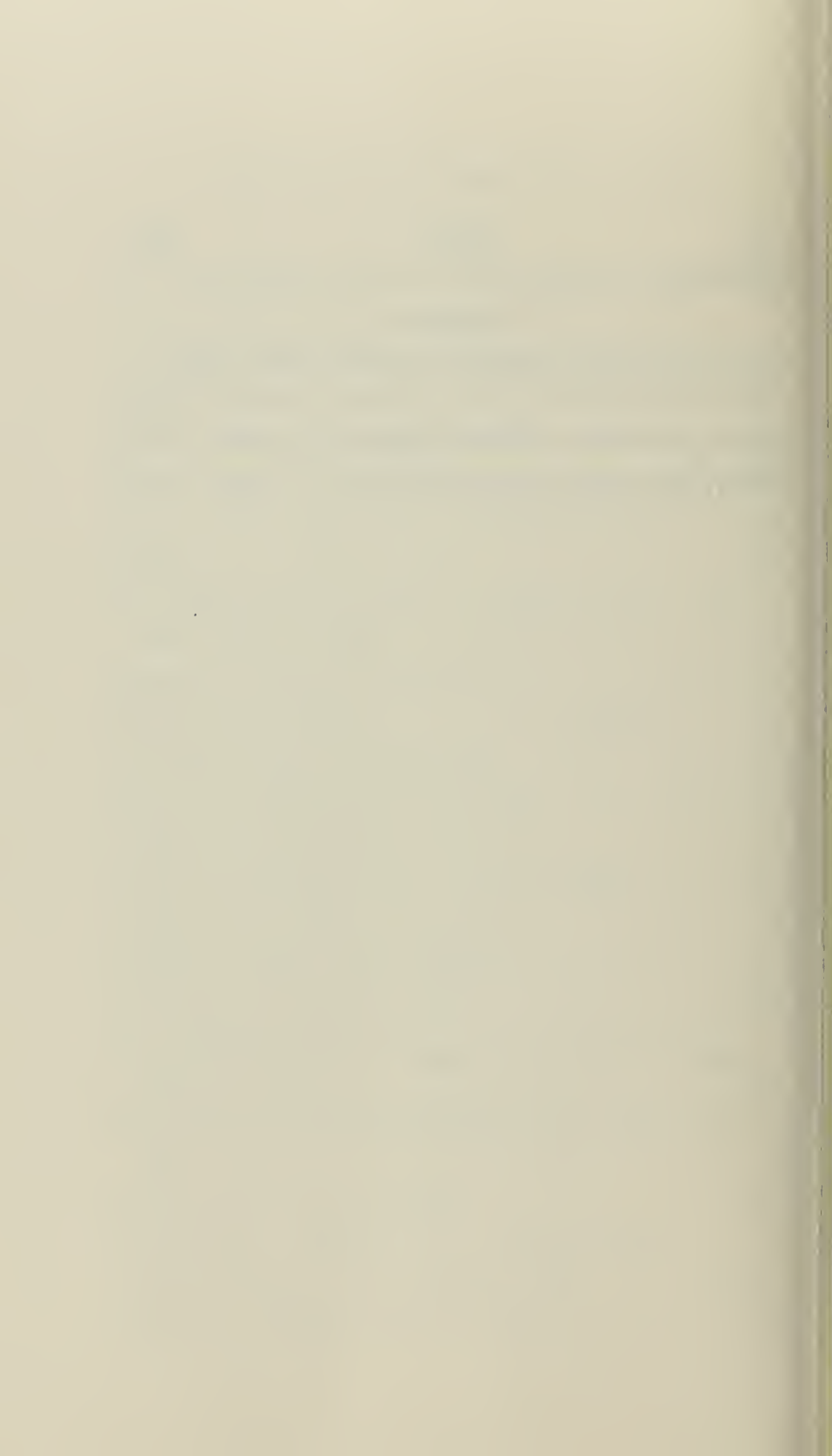
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APPELLEE'S BRIEF.

Statement of the Case.

Appellee does not agree with the Appellant's Statement of the Case and sets forth its own statement.

Prior to the initiation of the bankruptcy proceedings involving R. M. Hacker, Bonafide Mills, Inc., the appellee herein, delivered certain flooring merchandise to the Bankrupt under a consignment agreement. The Bankrupt then executed an assignment for the benefit of creditors to one M. W. Engleman as assignee who, it is claimed, took possession of the merchandise of Bonafide Mills, Inc. Subsequently, an involuntary petition in bankruptcy was filed against R. M. Hacker and A. J. Bumb, the appellant, was appointed receiver. The Bankrupt caused a plan of reorganization to be filed with the Court. While said proceedings were in progress, Bonafide Mills, Inc. filed a Petition in Reclamation in which the consignment agreement was alleged and in which Bonafide Mills, Inc. sought to recover the

merchandise in the possession of the Receiver. [Clk. Tr. p. 52.] The Receiver, A. J. Bumb, turned over to Bonafide Mills, Inc. its merchandise in the value of \$97,266.61. After the receipt of these materials Bonafide Mills, Inc. determined there was a shortage of materials in the amount of \$16,578.98. The Receiver claimed he had turned over to Bonafide Mills, Inc. all of the merchandise in his possession and the assignee for the benefit of creditors claims it had turned over to the Receiver all of the merchandise of Bonafide Mills, Inc.

Subsequently, an agreement was entered into with respect to the Petition in Reclamation in which the amount of the claim of Bonafide Mills, Inc. was set forth, the Petition dismissed and the right to bring suit for damages was reserved to Bonafide Mills, Inc. [Clk. Tr. p. 193.]

After the filing of said Stipulation, Bonafide Mills, Inc. filed suit in the Superior Court of the State of California against M. W. Engleman, the assignee and against A. J. Bumb, not for the return of the merchandise, but for negligence in allowing the merchandise of Bonafide Mills, Inc. to become lost to the damage of Bonafide Mills, Inc. in the amount of \$16,578.98.

Upon the petition of A. J. Bumb, the Bankruptcy Court enjoined Bonafide Mills, Inc. from proceeding with its action against A. J. Bumb in the State Court. This order was made despite the objections of Bonafide Mills, Inc. that the Bankruptcy Court does not have jurisdiction to issue such an order.

One result of the order was that Bonafide Mills, Inc. would have to try its law suit twice, once against M. W. Engleman in the State Court and once against A. J. Bumb in the Bankruptcy Court. Bonafide Mills, Inc. then obtained a review of the Bankruptcy Court Order in the District Court which set aside and vacated the injunction and this appeal followed.

POINT ONE.

Raising Jurisdiction Question in Response to Temporary Restraining Order.

The response filed by Bonafide Mills, Inc. to the temporary restraining order of A. J. Bumb raised the jurisdictional question. A. J. Bumb argues that Bonafide Mills, Inc. never objected to the jurisdiction of the Bankruptcy Court to issue the injunction and argued the matter on its merits. A. J. Bumb argues that the Response of Bonafide Mills, Inc. "goes to the merits of the controversy and does not include an objection to the jurisdiction of the Court". However, it should be pointed out that there was no testimony taken at the hearing before the Referee in Bankruptcy and there was only oral argument as to whether the Court could issue the injunction.

The response filed by Bonafide Mills, Inc. to the Temporary Restraining Order raised the jurisdictional question and was a reply to the points raised in the Application for Temporary Restraining Order filed by A. J. Bumb. The application raised points and cited facts as a purported basis for the Bankruptcy Court

to assume jurisdiction to issue the injunction. Bonafide Mills, Inc. claimed that some of the facts set forth in the Application, which were used as a basis of assuming jurisdiction, were not true and, therefore, Bonafide Mills, Inc., in order to raise the jurisdictional question, filed a Response setting forth its statement of facts. Thus, in order to raise the issue of whether the Bankruptcy Court had jurisdiction, Bonafide Mills, Inc. had to join issue on the facts of the case. An analysis of the Application demonstrates this point.

The Application recites the filing of a creditors claim and the Petition in Reclamation; it asserts that the Petition in Reclamation has not been dismissed, that A. J. Bumb was not a party to the Stipulation to Withdraw the Petition in Reclamation, etc. It was necessary for Bonafide Mills, Inc. to allege facts in its response to show that the Petition in Reclamation was dismissed, that the personal property sold by Bonafide Mills, Inc. was not in *custodia legis*, that the suit in the State Court would not in any manner affect the bankruptcy proceedings but only affected A. J. Bumb personally; that A. J. Bumb filed a final accounting and, therefore, assumed that the Petition in Reclamation was dismissed, etc. [See Response to Order to Show Cause, Clk. Tr. p. 236.]

We, therefore, respectfully submit that the Response of Bonafide Mills, Inc. does raise the jurisdictional question and that this defense has not been waived.

POINT TWO.

Does the Filing of a Proof of Claim and a Petition in Reclamation and the Receipt of Dividends Confer Upon the Bankruptcy Court Jurisdiction to Stay a State Court Action for Negligence Against a Receiver?

It is argued by A. J. Bumb that the acts of Bona-fide Mills, Inc. constitute an election to have all matters heard in the Bankruptcy Court. One such act is the filing of a Creditors Claim and the other is the filing of the Petition in Reclamation. Neither of these acts, separately or together, give to the Bankruptcy Court jurisdiction to determine whether A. J. Bumb is liable personally for negligently losing the property of Bona-fide Mills, Inc. or give to the Bankruptcy Court jurisdiction to enjoin an action in the State Court against A. J. Bumb for damages for such negligence.

The filing of a claim in bankruptcy does not confer upon the Bankruptcy Court jurisdiction to determine all matters which may arise. This consent is limited. In *Nicholas v. Cohn*, 255 F. 2d 301, the court held that the filing of a claim against a bankrupt corporation by a guardian of an estate of his minor daughter in his *individual* capacity did not amount to a consent to summary jurisdiction with respect to a determination of whether the withdrawal of certain funds by the guardian constituted preferential payments.

The cases supporting the rule that the filing of a claim constitutes a consent to jurisdiction are limited to situations where rights to property subject to, or possibly subject to, the jurisdiction of the bankruptcy court are involved. They concern situations in which the trustee in bankruptcy brings a counter-claim or

seeks some affirmative relief against the creditor. No case can be found holding that the filing of a claim by a creditor is a consent to the power of a bankruptcy court to enjoin a suit against the Receiver for negligence. In other words, if a creditor files a claim in bankruptcy for money due, the Bankruptcy Court may hear a counter-claim against the creditor for an over-payment but the filing of the claim would not grant to the Bankruptcy Court jurisdiction to enjoin the Creditor from suing a Receiver for negligently losing the property of the creditor.

Section 23B of the Bankruptcy Act provides:

“Suits by the Receiver and the Trustees shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in Sections 60, 67 and 70 of this act.”

Most cases of consent are under this section and deal with suits by the trustee. Even under this section, the consent is limited.

The consent provided for in this section was not intended to enlarge the jurisdiction of the District Court so as to give it a jurisdiction which it would not have because of diverse citizenship and a requisite amount in controversy or by reason of a cause of action arising under the Constitution or laws of the United States. *Lovell v. Newman*, 227 U. S. 412; *Coyle v. Duncan Spangler Coal Co.*, 288 Fed. 897; *Kaigler v. Gibson*, 264 Fed. 240; *In re Teschmacher & Mrazay*, 127 Fed. 728; *Fitch v. Richardson*, 147 Fed. 196.

The same reasoning holds true with respect to the Petition in Reclamation filed by Bonafide Mills, Inc. This act would confer jurisdiction to determine title, offsets of the bankrupt and similar questions, but it would not confer the power to enjoin an action brought in a State Court to recover damages for negligence.

The cases cited by A. J. Bumb in his opening brief clearly established the points raised by Bonafide Mills, Inc. herein, that the filing of a proof of claim in bankruptcy does amount to a consent to the summary jurisdiction of the bankruptcy court for certain purposes only but that this does not amount to consent to jurisdiction to any matter whatsoever that may arise in the future.

The consent will confer jurisdiction to hear a counter-claim of the trustee against the creditor, but it will not confer jurisdiction upon the court to restrain an action by the creditor for negligence.

A review of the cases cited by A. J. Bumb will demonstrate this point;

Intra-State National Bank of Kansas City v. Luther, 221 F. 2d 382. A creditor filed a proof of claim. The trustee set up as a counter-claim a preference received by the creditor. The Court held that the creditor had consented to the summary jurisdiction of the Bankruptcy Court to hear this counter-claim.

In re Solar Manufacturing Corporation, 200 F. 2d 327. A creditor filed a proof of claim. The Court held that the Bankruptcy Court had summary jurisdiction to hear a counter-claim of the trustee attacking certain accounts of the creditor.

Columbia Foundry Co. v. Lochner, 179 F. 2d 630. A creditor filed a claim against certain assets in the bankrupt estate and the court held that the Bankruptcy Court had summary jurisdiction to hear a claim of the trustee that the creditor had taken assets of the bankrupt. The case of *Chase National Bank v. Lyford*, 147 F. 2d 273, which also is cited by A. J. Bumb, is also to the same effect.

The case of *In re Nathan*, 98 F. Supp. 686, is also relied upon by A. J. Bumb. In this case a creditor filed a proof of claim in bankruptcy. The Court held that the Bankruptcy Court had summary jurisdiction to hear a counter-claim of the trustee to recover a voidable preference. This case discusses only the question of the summary jurisdiction of the Bankruptcy Court to hear a counter-claim of the trustee. The case can only be cited for establishing the rule on the summary jurisdiction of the Bankruptcy Court to hear such counter-claims. All of the previous cases only deal with the question of a counter-claim by the trustee and because in the instant case on review there is no question of a Receiver filing such a counter-claim, these cases are not in point and are not material to the issue before us.

The next cases cited by A. J. Bumb are more closely related to the problem presented herein.

In re Green, 58 F. 2d 807. The Bankruptcy Court enjoined a State Court proceeding against the trustee individually. The plaintiff in the State Court action had sued the trustee for conversion of personal property. The Circuit Court of Appeals held the injunction was proper because the plaintiff had previously filed a petition in the Bankruptcy Court in which title

to the property was asserted and that issue was decided against the plaintiff. This case clearly turns on the question of *res adjudicata*. The plaintiff had asserted in the Bankruptcy Court that the trustee had in his possession certain property which belonged to the plaintiff. The Bankruptcy Court held that plaintiff did not have such title. Then the plaintiff sued the trustee in the State Court for conversion of the property in selling it in the bankruptcy proceedings. The question of the title in the plaintiff having been already decided adversely against the plaintiff, the Bankruptcy Court enjoined the plaintiff from proceeding in the State Court.

The case *In re Trayna & Cohn*, 195 Fed. 486, which is relied on by the Court in the *Green* case, also turns on the fact that the plaintiff in the State Court attempted to recover the assets in the Bankruptcy Court where the proceeding was decided against the plaintiff, the plaintiff having failed to appear at the time of the hearing and a default having been entered.

The instant case is distinguishable from the foregoing two cases. Bonafide Mills, Inc. had filed a Petition in Reclamation to recover possession of certain personal property. The Receiver returned to Bonafide Mills, Inc. a substantial portion of the property and raised no question as to the right of Bonafide Mills, Inc. to receive it. The Court could not decide the question of the right of Bonafide Mills, Inc. to recover possession of the balance of the property, because the Receiver no longer had possession of the property. The property was lost. Therefore, this matter could no longer be the subject of the petition to recover possession of property. The Petition in Reclamation was dismissed. The receiver filed his final accounting and

closed his books. Bonafide Mills, Inc. then filed its suit in the State Court to recover for the negligence which resulted in the loss of its property. There was no decision in the Bankruptcy Court that Bonafide Mills, Inc. did not have title to the property; there was no decision on the merits. The Stipulation providing for the dismissal of the Petition in Reclamation specifically reserved to Bonafide Mills, Inc. the right to pursue other remedies for the recovery of damages for the negligent loss of the property. This Stipulation was approved by the Bankruptcy Court. The Receiver approved this Stipulation when he filed his accounting.

We, therefor, assert that the filing of a proof of claim in bankruptcy or the filing of a Petition in Reclamation do not constitute a consent to the jurisdiction of the Bankruptcy Court to enjoin an action in the State Court filed against the Receiver in his personal capacity for negligence.

POINT THREE.

The Action Filed by Bonafide Mills, Inc., in the State Court Does Not Impair or Interfere With the Bankruptcy Proceedings.

Bonafide Mills, Inc. takes the position that its action in the State Court does not in any manner effect the bankruptcy proceedings and it will not in any manner change the bankruptcy proceedings.

A. J. Bumb cites various cases to support the proposition that the Bankruptcy Court had jurisdiction to issue this injunction to protect the bankrupt estate and to preserve the bankruptcy proceedings. If we assume for the moment that A. J. Bumb is liable to Bonafide Mills, Inc. for negligence in losing the property of Bonafide Mills, Inc. he would not be able to charge the

estate of the bankrupt for this loss and, therefore, the decision in the State Court would not in any manner alter the proceedings in the Bankruptcy Court and would not alter the distribution to the creditors. It is submitted that there is nothing in this case to protect.

The cases cited by A. J. Bumb as having an excellent discussion on the injunctive powers of the Bankruptcy Court are interesting but they do not support his contentions in this proceeding.

In re Lustron Corporation, 184 F. 2d 789 held that an injunction could issue to restrain an action to foreclose a mortgage in a State Court where the trustee asserted that the mortgages were invalid and the foreclosures would deplete the bankrupt estate and deprive the other creditors of their share of the bankrupt's property. The Court did not enjoin the action to protect the trustee personally, but because the injunction might result in an increase in the assets of the estate and creditors might receive a greater dividend.

This situation does not exist in the instant case.

In each of the cases cited in support of A. J. Bumb's position it will be found that the injunction was issued to preserve the assets in the estate and to prevent a reduction of those assets. This was also true of the two cases cited under Point Two of Appellant's Opening Brief and under Point Two of this reply. Thus in the cases of *In re Green, supra*, and *In re Trayna & Cohn, supra*, the trustee had received permission from the Bankruptcy Court to sell certain personal property. The State Court action was filed against the trustee for wrongfully selling that property. The injunction preserved the orders of the court. In the instant case there is no comparable situation.

POINT FOUR.

The Property of Bonafide Mills Was Not in Custodia Legis.

The first basis for the decision of the Bankruptcy Court in issuing its injunction is set forth in the first Conclusion of Law. [Clk. Tr. p. 239.] There it is stated that the inventory and merchandise of Bonafide Mills, Inc. was in *custodia legis* at all times. The Bankruptcy Court is apparently relying upon the general rule that if the property is in *custodia legis*, this confers summary jurisdiction upon the Bankruptcy Court.

The rule has been set forth in *Collier, Bankruptcy Manual*, Second Edition in Section 23 at page 306 as follows:

“Generally speaking, where the controversy is one concerning property in the actual or constructive possession of the Bankruptcy Court, that Court may adjudicate summarily all rights and claim pertaining thereto.”

This rule would seem to dispose of the matter, however, analysis will show that this rule does not apply to the instant case and consequently the finding will not support the Order of the Bankruptcy Court. The question to be determined is what rights and claims pertaining to the property does the Bankruptcy Court have summary jurisdiction to determine? Does this extend the power of all rights and claims or just some rights and claims?

It is submitted that if the property is in *custodia legis* that this only confers upon the Bankruptcy Court power to determine ownership or claims of liens or an interest in the property; it does not confer jurisdiction

to determine damages for negligence resulting in the loss of the property.

Thus in the case of *Autin v. Piske*, 24 F. 2d 626, the Court held that the Referee in bankruptcy had summary jurisdiction to try a claim by the trustee in bankruptcy to recover property transferred to defraud creditors. In *Zamore v. Goldblatt*, 194 F. 2d 933, the question was whether the Referee in Bankruptcy has summary jurisdiction to sell certain personal property free and clear of a chattel mortgage where the personal property of the bankrupt never came into possession of the mortgagee but remained in possession of the bankrupt and the trustee took possession from the bankrupt. The Court held that the Referee had summary jurisdiction to determine the validity of the mortgage. *In re H. M. Kouri Corporation*, 66 F. 2d 24. In this case the receiver gained exclusive possession of merchandise within the bankrupt's premises under an order voluntarily complied with by a factor who claimed a statutory lien on the merchandise. The factor had consented that the Bankruptcy Court could sell the property and the trustee could hold the proceeds of the sale. The Court held that the Bankruptcy Court had jurisdiction to administer the proceeds and could enjoin a suit by the factor in the State Court to enforce a lien.

These cases are a few examples of all the cases which apply the foregoing rule that confers jurisdiction upon the Bankruptcy Court where it has possession. It is submitted that all cases on this point are cases in which the right to possession, title or lien claims against the property were involved and that there are no cases under this rule permitting the assumption of jurisdic-

tion where a third person sues the receiver personally for damages flowing from negligent acts of the receiver which result in the loss of property belonging to the third person. Almost all cases deal with suits by the trustee to determine questions of title or possession.

In the case of *In re San Clemente Electric Supply*, 101 F. Supp. 252, one Brooks delivered to the bankrupt, before bankruptcy, three water softeners. They were delivered under an oral consignment agreement. The bankrupt entered into a trust receipt transaction with the Bank of America covering the water softeners. After bankruptcy was filed the trustee in bankruptcy took possession of the water softeners, sold them and paid the proceeds to the bank. Brooks then filed suit in the Municipal Court against the trustee and the Bank for conversion. The Referee in Bankruptcy issued a restraining order restraining Brooks from proceeding in the Municipal Court. The action was then tried before the Referee who ruled in favor of the Bank. On appeal Brooks contended that there was no jurisdiction in the Bankruptcy Court. On page 254 the Court states:

“Brooks attacks the jurisdiction of Bankruptcy Court, but we find this contention without merit. The Trustee came into possession of the property and thereafter under the summary jurisdiction of a Bankruptcy Court, undoubtedly *had jurisdiction to try title to the property. There is some question in the Court's mind as to whether or not the jurisdiction extended further to include the right of the Bankruptcy Court to try the claim for conversion against the trustee and to restrain the prosecution of the Municipal Court action.* However,

Brooks and the Bank of America, after November 8, 1948, consented to the jurisdiction of the Referee and appeared in the action. Time to review the order of November 8, 1950 (Restraining Order) and all other orders except that of June 27, 1950, expired without petition for review being filed.”

We have *italicized* certain portions for emphasis. The case clearly states that possession confers jurisdiction to try questions of title but it is doubtful if any other rights are conferred.

In the case of *Kapan v. Guttman*, 217 F. 2d 481, the Court held that once it had been determined in a summary hearing that the Bankrupt had no interest in the property, the Court had no jurisdiction to determine the rights of third parties to that property. This case turned upon the general rule, a question of title to property, but it does demonstrate that the power of the Bankruptcy Court is limited.

In the instant case, Bonafide Mills, Inc. had filed a Petition in Reclamation to recover its property. A. J. Bumb turned over to Bonafide Mills, Inc. property valued at \$97,266.61 without questioning the right of Bonafide Mills, Inc. to receive this property. It is the contention of Bonafide Mills, Inc. that there is no question of what interest Bonafide Mills, Inc. had in the property, the Receiver having recognized this interest when he handed over property to Bonafide Mills, Inc. A. J. Bumb later filed his final accounting and was discharged by the Court. In this accounting he stated that he had no other property. There is, therefore, no property of which the Bankruptcy Court has possession. There is only the question of whether he lost other property of Bonafide Mills, Inc. and is liable

for this loss, which, it is submitted is not a bankruptcy question.

It should be remembered that a Court of Bankruptcy is a Court of limited jurisdiction. *In re Hollins*, 229 Fed. 349. In *Collier Bankruptcy Manual*, Second Edition at page 341 there is a discussion of the jurisdiction of Federal Courts to hear an action against a trustee or a receiver. It is stated that actions against trustees or receivers are of three classes:

“(1) Suits against the Receiver or Trustee personally for wrongs committed while performing the duties of his office; (2) Suits against the Receiver or Trustee in connection with the carrying on of the Bankrupt’s business subsequent to bankruptcy; and (3) Suits against the Receiver or Trustee regarding the property of the bankrupt estate.”

It is then stated that suits under (1) and (2) are based upon the ordinary rules of Federal Jurisdiction.

“Actions in class (1) may be brought in a District Court sitting at law or in equity where the requisite jurisdictional grounds are present, just as in any other civil action.”

Thus only cases under (3) must be tried in the Bankruptcy Court. Therefore, the fact that A. J. Bumb had possession of the property would not confer jurisdiction upon the Bankruptcy Court to determine whether A. J. Bumb was negligent and caused damage to Bonafide Mills, Inc.

The case of *In re Kalb & Berger Mfg. Co.*, 165 Fed. 895 is a further example of the rule that suits filed against a Receiver personally for wrongs com-

mitted are not within the jurisdiction of the Bankruptcy Court and the Court has no power to enjoin such action in the State Court. In this case an action was filed in the Municipal Court against a Receiver personally to recover upon an agreement for the use of certain premises for storage of the bankrupt estate. The Bankruptcy Court enjoined the prosecution of the action. On page 896 the Court of Appeals states:

“While ordinarily, a Receiver acting within his powers is not personally liable upon his contracts, yet he may so contract as to bind himself; and if he acts beyond his powers he necessarily assumes individual responsibility. *The action in the Municipal Court, in so far as it was against the defendant personally could not be stayed by the District Court.*” (Emphasis added.)

To the same effect see *In re Kanter v. Cohen*, 121 Fed. 984; *In re Russell*, 101 Fed. 248; *In re Spitzer*, 130 Fed. 879.

On page 345.2 of *Collier Bankruptcy Manual*, Second Edition, the following appears:

“Where a Receiver or Trustee exceeds his authority he may be sued personally in a State Court, without leave of the Bankruptcy Court. Likewise, he may be sued in State Court without leave for torts committed in the conduct of the Bankrupt’s business. But where the suit is against the Receiver or Trustee in his official capacity concerning the estate, not connected with carrying on the business, leave of the Bankruptcy Court is necessary before a State Court can entertain the suit.”

A. J. Bumb did not conduct the business of the Bankrupt, and the action against him does not concern the estate, it concerns the property of Bonafide Mills, Inc. and upon which, it is claimed, A. J. Bumb committed a tort. Therefore, suit may be brought in the State Court.

On page 45 of the same work it is stated:

“A Receiver is liable personally for acts beyond his authority even when the wrongful acts were in his capacity as an Officer of the Court without personal interest on his part; in such matters he may be sued without the consent of the Bankruptcy Court in a Non-bankruptcy Court. The Bankruptcy Court will not undertake to enjoin such actions, except in the rare situation where the equities of the case may demand it.”

There has been no showing that the equities of this case require the issuance of an injunction. The bankrupt estate will not benefit, the creditors will not benefit, only A. J. Bumb personally can possibly benefit. On the other hand, the injunction would be harmful to Bonafide Mills, Inc. Bonafide Mills, Inc. would be required to proceed against A. J. Bumb in the Bankruptcy Court where he contends that he never had possession of property, and he might prevail on that issue; and Bonafide Mills, Inc. would have to proceed in the State Court against the assignee for the benefit of creditors, where he contends that he gave possession of the property to A. J. Bumb, and he might prevail on that issue. It would seem that the equities of the case are in favor of Bonafide Mills, Inc. to enable it to try its law suit once and against both the assignee for the benefit of creditors and A. J. Bumb.

POINT FIVE.

The Appellate Court Is Not Required to Accept the Findings of the Bankruptcy Court.

A. J. Bumb argues that this Court must accept the findings of the Referee. There was no oral testimony taken at the hearing before the Referee. There was only oral argument and a reference to the various documents that are part of the bankruptcy record. All of those matters are before this Court. There is no question of the Referee hearing a witness and judging his demeanor. In this case the entire record is made up of documents. The interpretation of these documents is a question of law and can be reviewed by this Court. Bonafide Mills, Inc. filed its objections to said findings which appear in its Petition for Review of Referee's Order Re Bonafide Mills, Inc. [Clk. Tr. p. 245] in which Bonafide Mills, Inc. objected to the findings and in each instance of the objection, the finding is based upon written documents which can be properly reviewed by this Court. These matters are, therefore, questions of law and not of fact.

POINT SIX.

The Filing of an Amended Proof of Claim by Bonafides Mills, Inc. Does Not Amount to a Waiver or Representation That A. J. Bumb Could Not Be Liable to Bonafide Mills, Inc.

In Point Five of the Opening Brief of A. J. Bumb it is argued that the filing of the amended claim by Bonafide Mills, Inc. constitutes a representation to the Bankruptcy Court that the loss of the merchandise of Bonafide Mills, Inc. occurred prior to the date of filing of the bankruptcy, and, therefore, that A. J. Bumb

had nothing to do with the merchandise. A. J. Bumb now argues this is a basis for enjoining the prosecution of the State Court action.

We disagree with the written opinion of the learned United States District Judge in this respect.

Bonafide Mills, Inc. had filed an amended claim in the amount of \$27,590.39. This claim is made up of the sum of \$11,011.41 for merchandise sold to the Bankrupt under a consignment agreement and not paid for or returned by the Bankrupt and the further sum of \$16,578.98 which is the amount of merchandise sold under consignment agreement and was some of the property sought to be recovered by the Petition in Reclamation.

The District Court Judge in his written opinion states that this claim must speak as of the date of the filing of the Petition in Bankruptcy and thus constitutes a representation to the Bankruptcy Court that on that day, the Bankrupt was indebted to Bonafide Mills, Inc. in the amount of \$27,590.39. We agree with this statement. We do not agree that it follows that this also amounts to a representation that A. J. Bumb could not be responsible of the loss of the merchandise in the amount of \$16,578.98.

Bonafide Mills, Inc. had filed a Petition in Reclamation to recover merchandise sold under consignment. Quoting from the District Court's opinion on page three thereof,

"It is admitted that of the merchandise which was the subject of the Petition in Reclamation, \$97,266.61 was returned to Bonafide Mills, Inc. whether by the Receiver of the Trustee (who in fact were one and the same person) does not appear."

The Petition in Reclamation continued to be pressed for the purpose of recovering the balance of the merchandise in the amount of \$16,578.98. The Bankrupt had not paid Bonafide Mills, Inc. for said merchandise and he had not returned it to Bonafide Mills, Inc. personally or through the Bankruptcy Court and, therefore, at the time of the filing of the Petition in Bankruptcy, he owed to Bonafide Mills, Inc. the value thereof. Therefore, the amended claim reflected the true status of the claim, that is, that the Bankrupt owed said sum to Bonafide Mills, Inc., but it does not follow that A. J. Bumb could not be responsible for the loss thereof. If A. J. Bumb was responsible for the loss thereof, this would not relieve the Bankrupt from having to account for this merchandise, and if he cannot, then he would still be liable for the value thereof. This fact is also true of the assignee for the benefit of creditors; if the assignee is liable this does not relieve the Bankrupt. We feel that the Stipulation Fixing The Amount Of Unsecured Claim, etc. clearly reflects that Bonafide Mills, Inc. intended to keep alive its claim against all persons who might be responsible for the loss of the merchandise. The Bankruptcy Court also recognized that this right was being retained and expressly consented to it in its Order which reads as follows:

“IT IS FURTHER ORDERED, ADJUDGED AND DEEMED THAT THE Petition in Reclamation heretofore filed herein by Bonafide Mills, Inc. be dismissed without prejudice to the right of said Bonafide Mills, Inc. to pursue any remedy it desires against any person, firm or corporation for the purpose of asserting a claim for damages for

the loss of the consigned merchandise in the amount of \$16,578.98, and that with reference to said amount represented by said consigned merchandise 60% of all cash payments received by Bonafide Mills, Inc. shall be applied in the reduction of said claim.”

Thus there has been no change of position by Bonafide Mills, Inc. and no misrepresentation by Bonafide Mills, Inc. to the Bankruptcy Court. It is the opinion of Bonafide Mills, Inc. that the Bankrupt does owe to it the total sum of \$27,590.39 but it was represented that other persons may also have an obligation to pay a portion of this claim. If the Bankrupt Hacker should pay this claim, then this should reduce the possible liability of other persons and the Stipulation so provides.

We, therefore, respectfully submit that the Bankruptcy Court does not have jurisdiction to issue the injunction herein and that Bonafide Mills, Inc. should be permitted to proceed with its action in the State Court.

BROWN & BROWN,
By MAYNARD J. BROWN,
Attorneys for Bonafide Mills, Inc.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliancy with those rules.

MAYNARD J. BROWN

